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Enforcing Surrogacy Agreements in the Courts: Pushing for an Intent-Based Standard

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ENFORCING SURROGACY AGREEMENTS IN THE COURTS: PUSHING FOR AN INTENT-BASED STANDARD

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I. INTRODUCTION: PENNSYLVANIA TAKES BABY STEPS

Sherri Shepherd, actor and former co-host of *The View*, made headlines when she sought to have a surrogacy contract invalidated in a Pennsylvania court.[1] Shepherd and her ex-husband, Lamar Sally, had entered into a surrogacy agreement while they were married, but the two divorced when the surrogate mother, also known as a gestational carrier, was pregnant, leaving Shepherd to pay $4,000 each month in child support.[2] Following a petition by the gestational carrier, Shepherd then claimed the agreement was invalid and denied parental rights to the child.[3] The Montgomery County Court of Common Pleas enforced the agreement, and on appeal, Shepherd argued the court had "usurped legislative authority" by upholding the agreement where there was no statute on point.[4] The Superior Court of Pennsylvania ultimately upheld the agreement, finding public policy did not prevent the enforcement of surrogacy agreement.[5]

Pennsylvania lacks statutory law relating to the enforcement of surrogacy agreements, but most county courts have been willing to enter pre-birth orders recognizing intended parents as birth parents upon the child's birth.[6] Case law

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1. *See* Lizzy McLellan, *Actress Takes Surrogacy Case to State Supreme Court*, LEGAL INTELLIGENCER (Jan. 13, 2016) [hereinafter McLellan (1)], http://www. thelegalintelligencer.com/id=1202746996445 /Actress-Takes-Surrogacy-Case-to-State-High-Court [https://perm a.cc/HRC5-M2X8] ; Lizzy McLellan, *Justices Deny Actress' Appeal on Surrogacy Contract*, LEGAL INTELLIGENCER (Mar. 1, 2016) [hereinafter McLellan (2)], https://advance.lex is.com/search?crid=bf0f7c7a-063a-476c-8a09-9fb2eafc991a&pdsearchterms=LNSDUID-AL M-LGLINT-1202751051821&pdbypasscitatordocs=False&pdmfid=000516&pdisurlapi=true [https://perma.cc/Z4G5-NKT2].

2. *See* McLellan (1), *supra* note 1.

3. *See id.* Shepherd brought this action in Pennsylvania because the gestation carrier resided in Pennsylvania. *See id.*; *see also Surrogacy Contracts Directly Enforceable in Pennsylvania*, BILL OF HEALTH (Nov. 30, 2015), http://blogs.harvard.edu/billofhealth/2015/11/30/surrogacy-contracts-directly-enforcible-in-pennsylvania/ [https://perma.cc/6RSN-Z4SP] (stating gestational carrier "filed a petition seeking a declaration that both intended parents were the legal parents of Baby S. and directing that their names be entered on the birth certificate" after baby was born and gestational carrier was solely listed on birth certificate).

4. *See* McLellan (1), *supra* note 1.

5. *See In re* Baby S., 128 A.3d 296, 306 (Pa. Super. Ct. 2015).

6. *See* Krista Sirola, Comment, *Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania*, 14 AM. U.J. GENDER & SOC. POL'Y & L. 131, 141–42 n.68 (2006). Finally, although Pennsylvania has no laws concerning surrogacy, the Department of Health has adopted a gestational surrogacy policy. The policy permits hospitals to issue a child's birth certificate bearing the names of the intended parents. However, the state did not enact this procedure by statute and therefore it is not binding on the courts.

also remains limited in Pennsylvania, but *Baby S* provided some guidance to trial courts for the future. While the superior court decision seemingly solidifies the validity of surrogacy agreements in Pennsylvania, the Supreme Court of Pennsylvania missed an opportunity to set strong precedent on how to enforce these agreements when it declined to hear the case.[7]

As the case law remains uncertain in most states, problems can arise due to jurisdictions lacking the laws necessary to protect parties. Use of surrogacy continues to grow in the United States, but the law has not kept up with the trend.[8] The lack of legislation regarding surrogacy in most states has led state courts to deal with arising issues, resulting in inconsistent laws around the country.[9] No relevant federal law exists.[10]

Courts do not take a uniform approach to these cases. The Shepherd case highlights the problems that arise from inconsistent regulation. If this case had happened in the neighboring state of New Jersey where the gestational carrier resided, the outcome would have been completely different.[11]

This Article compares the various legal approaches to surrogacy throughout the United States and asserts that surrogacy agreements should be enforced in courts using an intent-based standard. Part II of this Article explains surrogacy and compares differing approaches to such agreements from different jurisdictions.[12] Part III provides a critique of relevant laws and asserts that courts should enforce surrogacy agreements and should apply an intent-based approach to determining parentage.[13] Part III also suggests restrictions on which agreements

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Id. at 141–42 (footnotes omitted).

7. *In re Baby S*, 132 A.3d 456 (Pa. 2016) (unpublished table decision) (denying petition for appeal).

8. *See* MAGDALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 3 (2010), http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf [https://perma.cc/F2C3-YJTM] (explaining growing prevalence of surrogacy in United States and lack of regulation). More and more people are turning to various forms of assisted reproductive technology (ART). These fertility options have become an important part of today's society for those who are unable to conceive a child naturally. *See* Caitlin Conklin, Note, *Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation,* 35 WOMEN'S RTS. L. REP. 67, 67 (2013) (explaining surrogacy has become more visible due to representations in popular culture and notable celebrities using surrogacy). Surrogacy in particular has become a popular third party ART for women with fertility problems or who are facing high-risk pregnancies, as well as for same-sex couples. *See* J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 351 (2011) (discussing clientele for ART includes women and men with fertility issues, as well as single mothers and gay couples).

9. *See generally* Conklin, *supra* note 8 (stating law varies from state to state).

10. *See Gestational Surrogacy Law Across the United States: State-by-State Interactive Map for Commercial Surrogacy*, CREATIVE FAMILY CONNECTIONS, LLC, http://www.creativefamilyconnections.com/us-surrogacy-law-map [https://perma.cc/X78Y-85UT] (last visited Apr. 30, 2016) (highlighting different laws throughout country through interactive map).

11. *See In re* T.J.S., 54 A.3d 263, 269–70 (N.J. 2012) (Hoens, J., concurring) (finding surrogacy contracts unenforceable in New Jersey). The concurrence is the controlling opinion in this case.

12. For a further discussion of surrogacy law in the United States, see *infra* notes 98–130 and accompanying text.

13. For a further discussion of the arguments for and against surrogacy agreements and the use of an intent-based approach, see *infra* notes 160–84 and accompanying text.

should be enforced to keep agreements in line with public policy.[14] Part IV concludes by assessing the need to allow and enforce surrogacy agreements to better protect a growing class of individuals who want to become parents.

II. CRYING OUT FOR HELP: THE INCONSISTENT STATE OF SURROGACY LAW THROUGHOUT THE COUNTRY

While the practice of surrogacy dates back to biblical times, the practice has fortunately evolved into a more ethical option for individuals and couples who need help starting a family.[15] In many ways, however, the law has failed to keep up with the changing technology, and courts must try to apply outdated laws to modern circumstances.[16] Various state courts have taken different paths when confronted with the decision of whether to enforce a surrogacy agreement, and the limited legislative actions by state legislatures are equally as divided.[17]

A. Information on Surrogacy

Many different individuals contribute to having a child through surrogacy.[18] First, surrogacy involves the intended parents—individuals who plan to have the child and who will be raising the child after he or she is born.[19] The intended parents may or may not be genetically related to the child.[20] The next individual involved in the surrogacy process is the woman who carries the child.[21] Last, surrogacy may involve egg or sperm donors.[22] If involved, these individuals maintain a genetic relation to the child; however, sperm and egg donors typically agree to relinquish all parental rights upon donation.[23] With all of the individuals

14. For a further discussion of limitations that should be put on surrogacy agreements, see *infra* notes 185–89 and accompanying text.

15. *See id.* (discussing surrogacy as option for gay couples or heterosexual couples where woman is unable to conceive or would face high-risk pregnancy); *see also* Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 116–17 (1997) (explaining evolution of surrogacy from biblical times).

16. *See, e.g.*, DiFonzo & Stern, *supra* note 8, at 349 (noting judicial responses to new technology and arguing "judges and lawmakers should no longer rely on outmoded presumptions when crafting the legal norms for parentage and custody determinations").

17. *See* JESSICA ARONS, CENT. FOR AM. PROGRESS, FUTURE CHOICES: ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE LAW 24–29 (2007), https://cdn. americanprogress.org/wp-content/uploads/issues/2007/12/pdf/arons_art.pdf [https://perma.cc/JRE4-5ALJ] (categorizing different types of surrogacy laws in each state into bans, voids and penalizes, voids only, prohibits some/allows others, and allows but regulates).

18. *See* Craig Dashiell, Note, *From Louise Brown to Baby M and Beyond: A Proposed Framework for Understanding Surrogacy*, 65 RUTGERS L. REV. 851, 855 (2013) (listing all individuals who can be considered in determining parental rights as part of gestational surrogacy agreement).

19. *See id.*

20. *See id.*

21. *See id.* Once again, she may or may not be genetically connected to the child depending on the type of surrogacy used; however, she is frequently considered the biological mother because she physically gives birth to the child. *See id.*

22. *See id.*

23. *See id.*; *see also* Deborah L. Forman, *Embryo Disposition, Divorce & Family Law*

involved in the pregnancy and birth of the child, determining who is legally responsible for the child upon birth can become challenging, particularly under state laws that fail to account for Assisted Reproductive Technologies (ARTs), such as surrogacy, or that provide outdated notions of parenthood.[24]

There are two different types of surrogacy: traditional and gestational.[25] Traditional surrogacy involves a surrogate mother who is impregnated through the process of artificial insemination.[26] This means the surrogate's own egg is used, and therefore in traditional surrogacy, the surrogate is also the genetic mother of the child.[27] The genetic father may be either the intended father or a disinterested sperm donor.

Gestational surrogacy, by contrast, occurs when a gestational carrier becomes pregnant through in vitro fertilization (IVF), using either a donated egg and sperm or the intended parents' egg and sperm.[28] Courts have been more willing to enforce gestational surrogacy agreements than traditional surrogacy agreements due to the gestational carrier's lack of genetic connection to the child that occurs when gestational surrogacy is used.[29] Additionally, both types of surrogacy can be either compensated or altruistic.[30]

B. Surrogacy in the State Courts

Since the popularity of surrogacy began growing in the 1970s, courts have struggled with how to interpret the resulting agreements.[31] While statutes specifically regarding surrogacy are usually lacking, outdated statutes regarding parentage may hinder the enforcement of an agreement.[32] Courts have typically taken one of the following approaches to determining parenthood and the validity of a surrogacy agreement: a gestational approach, a genetics-based approach, or an intent-based approach.[33]

Contracting: A Model for Enforceability, 24 COLUM. J. GENDER & L. 378, 395, 407 (2013) (discussing use of gamete donors to create cryopreserved embryos).

24. *See* Dashiell, *supra*, note 18, at 856 (explaining courts are usually willing to favor intended parents with genetic connection to child but problems arise when genetic donors are used).

25. *See* Mark Strasser, *Traditional Surrogacy Contracts, Partial Enforcement, and the Challenge for Family Law,* 18 J. HEALTH CARE L. & POL'Y 85, 87 (2015).

26. *See id.*

27. *See id.*

28. *See id.* at 87–88.

29. *See id.* at 88 (stating traditional surrogacy is less expensive but genetic connection to child may make surrendering the child more difficult for surrogate); *see also In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 899–901 (Ct. App. 1994).

30. *See* Jennifer L. Watson, Comment, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers Be Compensated for Their Services?,* 6 WHITTIER J. CHILD & FAM. ADVOC. 529, 532–33 (2007) (explaining some states allow surrogates to receive fees while others do not).

31. *See id.* (discussing judicial split on issue of whether surrogates can receive compensation).

32. *See e.g.,* DiFonzo & Stern, *supra* note 8, at 346.

33. *See* Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 102–09 (2010) (adding best interests of child as additional approach along with applying contracts principles).

1. Gestational Approach

The Supreme Court of New Jersey famously became the first state supreme court to tackle the enforceability of surrogacy agreements in *Matter of Baby M*.[34] This case involved a traditional surrogacy agreement between the intended father, Mr. William Stern, and a surrogate mother, Mrs. Mary Beth Whitehead.[35] Elizabeth Stern, Mr. Stern's wife and the intended mother of Baby M, was not listed as a party to the contract, but the agreement provided Mrs. Stern with custody of the child if Mr. Stern passed away.[36] Mrs. Whitehead's husband, however, was a party to the contract, so he could rebut the presumption of his paternity upon the birth of Baby M.[37] Mrs. Whitehead agreed to be artificially inseminated using her own egg and Mr. Stern's sperm.[38] After delivery, Mrs. Whitehead would terminate her parental rights, and Mr. Whitehead would rebut the statutory presumption of paternity.[39] Mrs. Whitehead would then hand the child over to the Sterns.[40] Mrs. Stern would then adopt the child.[41] The contract also provided for Mr. Stern to pay Mrs. Whitehead $10,000 upon delivery of the child, and in a separate contract, Mr. Stern agreed to pay $7,500 to a fertility clinic that had helped facilitate the arrangement.[42]

Mrs. Whitehead gave birth to Baby M on March 27, 1986.[43] At the hospital, the Whiteheads acted as if they were the "proud parents" of the child, and her birth certificate listed her name as Sara Elizabeth Whitehead.[44] Mrs. Whitehead soon realized she did not want to part with the child but initially complied with the agreement.[45] The Sterns took Baby M home on March 30, 1986.[46] They named the baby Melissa.[47] Mrs. Whitehead quickly became distressed over the baby, and the Sterns agreed to let Mrs. Whitehead take Baby M for a week out of their fear that Mrs. Whitehead might otherwise commit suicide.[48] The Sterns did not get Baby M back for four months.[49] Mr. Stern filed a complaint to have the

34. 537 A.2d 1227 (N.J. 1988); *see* Sirola, *supra* note 6, at 135 (stating *Baby M* "laid the foundation for the first judicial approach to surrogacy").

35. *See Baby M*, 537 A.2d at 1235 (stating parties entered into written contract for agreement). The Sterns sought a surrogate due to perceived medical risks for Mrs. Stern making pregnancy a "serious health risk" because of Mrs. Stern's multiple sclerosis. *See id.*

36. *See id.* (stating Mrs. Stern's exclusion from contract was most likely to avoid relevant baby-selling statute).

37. *See id.* (stating Mr. Whitehead was party to contract).

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.* ("[The Infertility Center of New York] arranged for the surrogacy contract by bringing the parties together, explaining the process to them, furnishing them the contractual form, and providing legal counsel.").

43. *See id.* at 1236.

44. *See id.*

45. *See id.* (explaining Mrs. Whitehead broke into tears upon Sterns's discussion of their name for baby).

46. *See id.*

47. *See id.*

48. *See id.* at 1236–37.

49. *See id.* at 1237.

surrogacy contract enforced and claimed Mrs. Whitehead threatened to leave New Jersey with the baby.[50] The Whiteheads fled to Florida when the order was entered but were ultimately forced to return after the Sterns initiated supplementary proceedings in Florida.[51]

The trial court found the surrogacy contract valid and enforceable and ordered termination of Mrs. Whitehead's parental rights.[52] Mrs. Whitehead appealed this decision, which ultimately made it to the Supreme Court of New Jersey.[53] The Supreme Court of New Jersey overturned the trial court's decision and invalidated surrogacy agreements where a surrogate is paid to surrender the child.[54] The court found the agreement was contrary to public policy due to the separation of a child from its natural parent and because surrogacy had the potential to degrade women.[55] The court stated the agreements conflicted with the New Jersey Parentage Act because the Act only defined "mother" as "birth mother," and the court did not want to allow the birth mother to be compelled to terminate her parental rights.[56] Thus, the court adopted a gestational standard to determining maternity and recognized Mrs. Whitehead as Baby M's legal mother.[57]

The Supreme Court of New Jersey had the opportunity to revisit the validity of surrogacy contracts with a gestational surrogacy agreement in 2012 but still found the agreements unenforceable.[58] In *In re T.J.S.*,[59] T.J.S. and A.L.S. entered into a gestational carrier agreement with A.F., who would act as their gestational carrier.[60] A.F. became pregnant through IVF using an anonymous egg donor, so A.F. had no genetic connection to the baby.[61] The surrogacy agreement provided that A.F. would relinquish parental rights to the child seventy-two hours after the baby was born but not prior to birth.[62] To prepare for the baby, the intended parents received a pre-birth order from the Superior Court of New Jersey, Family Part to have their names listed as the legal parents on the baby's birth certificate following A.F.'s renouncement of her rights.[63]

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50. *See id.*

51. *See id.*

52. *See id.* at 1237–38 (noting inconsistency by trial court where trial court "clearly express[ed]" view that agreement was valid but focused much of the trial on what was best for the child).

53. *See id.* at 1238 (stating court granted continuation of visitation rights for Mrs. Whitehead during appeal).

54. *See id.* at 1240.

55. *See id.* at 1246–51 (finding contract contrary to public policy that children should remain with natural parents and contract disregarded best interest of baby).

56. *See id.* at 1241–46 (finding contract conflicted with "(1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions").

57. *See id.* at 1263. On remand, the superior court the court held that Baby M's "best interests will be served by unsupervised, uninterrupted, liberal visitation with her mother." *In re* Baby M, 542 A.2d 52, 53 (N.J. Ch. 1988).

58. *See In re* T.J.S., 54 A.3d 263, 263 (N.J. 2012) (per curium).

59. 54 A.3d 263 (N.J. 2012) (per curium).

60. *See id.* at 264 (Hoens, J., concurring).

61. *See id.*

62. *See id.* at 270–71 (Albin, J., dissenting).

63. *See id.* at 271.

After the baby was born, A.F. relinquished her rights, and the intended parents were listed on the birth certificate.[64] While no party to the agreement attempted to fight this outcome, the Department of Health and Senior Services acted on its own to file a motion for the court to vacate the pre-birth order and remove A.L.S. from being listed as the child's mother.[65] This case made it to the Supreme Court of New Jersey where an equally-split court upheld the appellate division's order to vacate the agreement.[66] Once again failing to validate a surrogacy agreement, the court based its holding on the statutory provisions requiring a legal mother to be biologically or genetically connected to the child and its rejection of the plaintiffs' equal protection claims.[67] Furthermore, the court stated that the validity of surrogacy contracts should be addressed by the legislature for the law to change.[68]

2. Intent-Based Approach

Baby M remained the most influential court decision on surrogacy for years, but eventually, state courts began to break away. Another famous surrogacy case, *Johnson v. Calvert*,[69] occurred in California in 1993.[70] *Johnson* involved a gestational surrogacy where the intended parents' sperm and egg were used to create the embryo that was implanted in the gestational carrier through IVF.[71] During the pregnancy, the relationship between the intended parents and the gestational carrier began to fall apart, and the carrier threatened to keep the baby if she was not given her final payment prior to the birth of the child, instead of the agreed upon payment following the child's birth.[72] In response, the intended parents filed a lawsuit seeking a declaration that they were the legal parents of the baby, and the gestational carrier filed her own suit.[73]

The Supreme Court of California resolved the issue of parenthood with an intent-based standard.[74] The court first examined the relevant statutory provisions for establishing a mother and child relationship, which allowed either giving birth to the child or a genetic relationship to the child to satisfactorily establish maternity.[75] Because both women met this standard, the court determined who the natural mother was based on "who intended to procreate the child" and who "intended to raise [the child] as her own."[76] Thus, the court found the intended mother to be the child's natural mother under the law because she initiated the IVF process to bring the child into existence—the intended parents planned to

64. *See id.*
65. *See id.*
66. *See id.* at 263 (per curiam).
67. *See id.* at 264–69 (Hoens, J., concurring).
68. *See id.*
69. 851 P.2d 776 (Cal. 1993) (in bank).
70. *See generally* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (in bank).
71. *See id.* at 778.
72. *See id.*
73. *See id.*
74. *See id.* at 782.
75. *See id.* at 780.
76. *See id.* at 782.

bring a child of their genetic makeup into the world, not to "donate a zygote to" the surrogate.[77] Additionally, the court also noted it felt comfortable considering the intentions of the parties "as expressed in the surrogacy contract" because they did not find the agreement to be inconsistent with public policy.[78] Further, in 1998, a California appellate court utilized the intent-based test again and found an intended mother with no genetic connection to a child was the legal mother of the child based on her initiation of the process and intention to raise the child as her own.[79]

While the court in *Johnson* took a big step in upholding a surrogacy agreement as valid, the decision rested heavily on the fact that the intended mother was also the child's genetic mother.[80] However, one year later, a California appellate court found a traditional surrogacy agreement unenforceable.[81]

In *In re Marriage of Moschetta*,[82] Robert and Cynthia Moschetta entered into a traditional surrogacy agreement with Elvira Jordan who would act as their carrier.[83] After Jordan became pregnant through artificial insemination using the husband's sperm, the Moschettas's relationship began to deteriorate.[84] The couple split within seven months of the child's birth, and Robert took the child with him.[85] Ultimately, the court determined Jordan was the child's mother and found the traditional surrogacy agreement unenforceable.[86] The court noted the result would have a "disquieting" effect on couples who cannot afford IVF, which is more costly than artificial insemination, or women whose eggs are not suitable for IVF, because they would not have the same benefit of the *Johnson* decision.[87] Thus, the court noted, "the need for legislative guidance regarding the difficult problems arising from surrogacy arrangements is apparent."[88]

3. Genetics-Based Approach

Another approach courts have taken to determine parentage is a genetics-based approach.[89] In *Belsito v. Clark*,[90] Anthony and Shelley Belsito entered into a surrogacy agreement with Shelley's sister, Carol.[91] Carol agreed to carry the Belsitos's child for them, and she underwent IVF with an embryo created

77. *See id.*
78. *See id.* at 783.
79. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998).
80. *See* Strasser, *supra* note 25, at 93–94 (noting that holding did not allow for traditional surrogacy agreement).
81. *See id.* at 94 (citing *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Ct. App. 1994)).
82. 30 Cal. Rptr. 2d 893 (Ct. App. 1994).
83. *See Moschetta*, 30 Cal. Rptr. 2d at 895.
84. *See id.*
85. *See id.*
86. *See id.* at 903.
87. *See id.*
88. *See id.*
89. *See* Spivack, *supra* note 33, at 105–06.
90. 644 N.E.2d 760 (Ohio C.P. 1994).
91. *See Belsito*, 644 N.E.2d at 761.

from Anthony's sperm and Shelley's egg.[92] Prior to the birth of the child, Shelley spoke to the hospital about the birth certificate.[93] Shelley was informed the woman who gave birth to the child would be listed as the mother, and because that person would not be married to the biological father, the birth records would indicate the child was illegitimate.[94] The Belsitos brought an action to be recognized as the legal parents of the child and argued they should not have to adopt the child.[95] There is no evidence Carol ever tried to assert any rights to the child. The California appeals court concluded that Anthony and Shelley were the child's natural parents because they were the genetic parents of the child.[96] This approach has not been followed by many jurisdictions.[97]

C. State Legislation

Many states lack statutory guidance on the validity of surrogacy agreements, including Alaska, Colorado, Georgia, Hawaii, Idaho, Maryland, Minnesota, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Vermont, and Wyoming.[98] In some of these states, pre-birth orders may be granted by courts allowing intended parents to be listed on birth certificates; however, this varies from state to state and may vary even from county to county when states lack legislative guidance on surrogacy.[99] Some of these states lack any relevant case law in addition to the lack of statutes.[100]

Some states prohibit surrogacy agreements altogether.[101] These states include Arizona, Indiana, Michigan, and New York.[102] Up until this past summer, Washington, D.C. and New York had the strictest bans on surrogacy agreements. The Washington, D.C. law found all surrogacy agreements void and unenforceable and imposed harsh penalties such as a $10,000 fine or one year in prison for anyone who violated the law.[103] Similarly, New York has strict laws banning surrogacy and implementing criminal penalties for those who enter surrogacy

92. *See id.*
93. *See id.* at 762.
94. *See id.*
95. *See id.*
96. *See id.*
97. *See e.g.,* ARK. CODE ANN. § 9-10-201 (West 2017) (adopting an intent-based approach); N.D. CENT. CODE ANN. § 14-18-05 (West 2017) (adopting a gestational approach); *Johnson v. Calvert,* 851 P.2d 776, 8 (Cal. 1993) (in bank) (adopting an intent-based approach); *Matter of Baby M.*, 537 A.2d 1227 (N.J. 1988) (adopting a gestational approach). For a further discussion of the jurisdictions that do not follow a genetics-based approach, see *supra* notes 34–88 and accompanying text.
98. *See* KAREN MOULDING & NAT'L LAWYERS GUILD, SEXUAL ORIENTATION & THE LAW § 1:33 (2016).
99. *See* CREATIVE FAMILY CONNECTIONS, *supra* note 10.
100. *See* id.
101. *See* MOULDING, *supra* note 98, at § 1:33.
102. *See id.*; CREATIVE FAMILY CONNECTIONS, *supra* note 10.
103. *See* Martin Austermuhle, *D.C. Debates Reversing Ban on Surrogacy Agreements*, WAMU (June 24, 2013), http://wamu.org/news/13/06/24/dc_debates_reversing_ban_on_ surrogacy_agreements [https://perma.cc/42Q6-E4GT] (explaining strict laws and possibility for change).

agreements.[104] However, the Washington, D.C. Council recently passed a bill overturning its ban on surrogacy.[105] New York has legislation pending that would allow gestational carrier agreements (but not traditional surrogacy agreements) and would provide regulation on who can act as a gestational carrier and how she can be compensated, as well as other restrictions as to the enforcement of the agreement.[106]

California, on the other hand, passed one of the most permissive surrogacy bills in the country in 2014.[107] In line with its judicially-created law allowing the enforcement of surrogacy agreements, the California law recognizes the validity of gestational surrogacy agreements when certain requirements are met.[108] Parties must have separate counsel, have the agreement notarized, attest to their compliance with the agreement under penalty of perjury, and file the agreement with the court.[109] Other states with statutes permitting surrogacy agreements include Florida, Illinois, Kansas, Kentucky, Nevada, New Hampshire, Texas, Utah, Virginia, and Washington.[110]

Each of these states has its own conditions that a surrogacy agreement must meet to be enforceable. States like California, Florida, Illinois, Nevada, Texas, and Utah, as well as Washington, D.C., only allow gestational surrogacy agreements.[111] Gestational carrier agreements are preferred because a gestational carrier arguably has less claim to the child she gives birth to where she does not share a genetic connection with the child.[112] The proposed legislation in New York only allows enforcement of gestational surrogacy agreements as well.[113] In a very recent turn of events, the state of Washington passed a law permitting

104. *See* N.Y. DOM. REL. LAW § 8-122 (Consol. 2018) ("Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable."); *see also* Abigail Wilkinson, *Gov. Christie Vetoes Gestational Surrogacy Bill in New Jersey*, CNS NEWS (July 10, 2015, 11:36 AM), http://www.cnsnews.com/news/article/abigail-wilkinson/gov-christie-vetoes-gestational-surrogacy-bill-new-jersey [https://perma.cc/99KJ-BXFE] (discussing laws of New York and New Jersey).

105. *See* Michael Alison Chandler, *With new surrogacy law, D.C. joins jurisdictions that are making it easier for gay and infertile couples to start families*, WASHINGTON POST (June 3, 2017), https://www.washingtonpost.com/local/social-issues/with-new-surrogacy-law-dc-joins-jurisdictions-that-are-making-it-easier-for-gay-and-infertile-couples-to-start-families/2017/06/03/845c90d4-3c99-11e7-8854-21f359183e8c_story.html?utm_term=.bbdb46d48591 [https://perma.cc/YT4M-654K].

106. N.Y. Sess. Laws 17-A, available at http://legislation.nysenate.gov/pdf/bills/2017/S17A [https://perma.cc/88PZ-UEVJ].

107. *See* CAL. FAM. CODE § 7962 (West 2017) (validating and regulating surrogacy agreements).

108. *See id.*

109. *See id.*

110. *See* MOULDING, *supra* note 98, at § 1:33; *see also* S.B. 6037, 2018 Session (Wash. Effective Jan. 1, 2019).

111. *See id.*; *see also* CAL. FAM. CODE § 7962.

112. *See* Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 611 (2003).

113. *See Surrogacy Parenting Agreement Act of 2013*, Bill 20-32, Period Twenty (D.C. 2013); S.B. 2547, 2013 Leg., 2013–14 Sess. (N.Y. 2013).

surrogacy agreements.[114] Surprisingly, the law allows both traditional and gestational surrogacy, contrary to other recent state laws that only allow gestational surrogacy.[115]

Some states prohibit compensated surrogacy agreements.[116] While these states do not allow fees to be paid to the gestational carriers for their services, many of these statutes allow the gestational carrier to receive "reasonable fees" for expenses such as medical, housing, and legal expenses.[117] Florida, Illinois, New Hampshire, Nevada, Utah, and Virginia require intended parents to have a genetic connection to the child for the agreement to be enforced. Additionally, Florida, Nevada, New Hampshire, Texas, Utah, and Virginia require the intended parents be married.[118]

In the past few years, two separate gubernatorial vetoes have shut down legislation permitting gestational carrier agreements with restrictions in New Jersey and Louisiana.[119] Governor Bobby Jindal of Louisiana stressed his concern for the "ramifications of government-endorsed surrogacy contracts."[120] Governor Chris Christie of New Jersey has vetoed this legislation twice now, citing moral and ethical concerns with surrogacy.[121]

The two vetoed bills provided guidelines for surrogacy agreements that are comparable to the legislation enacted in California and pending in New York. The New Jersey law would have validated gestational surrogacy agreements but required all agreements between parties be in writing.[122] The law also required gestational carriers to be at least twenty-one years-old, to have given birth to at least one other child, to be represented by independent counsel, and to undergo medical evaluations, including a psychological evaluation.[123] The gestational carrier would be able to receive "reasonable expenses in connection with the gestational carrier agreement."[124] The intended parents also have to undergo psychological evaluations under the law.[125] The law did not require intended parents be married, but if the intended parents were married, both partners would be required to enter into the agreement.[126] The law would then allow for the intended parents to be recognized as the child's legal parents upon birth, and further specified that neither the gestational carrier nor the spouse of the carrier would be

114. *See* S.B. 6037, 2018 Session (Wash. Effective Jan. 1, 2019); Ellen Trachman, *Washington State Flips Its Anti-Surrogacy Stance*, ABOVE THE LAW, (Mar. 21, 2018), https://abovethelaw.com/2018/03/washington-state-flips-its-anti-surrogacy-stance/ [https://perma.cc/5SLJ-RMHH].

115. *See* Trachman, *supra* note 114.

116. *See* MOULDING, *supra* note 98, at § 1:33.

117. *See id.*; *see also* FLA. STAT. ANN. § 742.15 (West 2017) (allowing reasonable expenses to be paid for gestational carrier).

118. *See* MOULDING, *supra* note 98, at § 1:33.

119. *See* Wilkinson, *supra* note 104.

120. *See id.*

121. *See id.*

122. *See* S.B. 1599, 215th Leg., 2012–13 Sess. (N.J. 2012).

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.*

considered legal parents of the child.[127] In comparison to the proposed New Jersey statute, the Louisiana bill had more restrictions, including restrictions for same-sex couples and single parents entering the agreements, and the law also "ensur[ed] that the surrogate mother would not be pressured into having an abortion for any reason."[128]

However, since Governor Christie left office, the New Jersey bill has now passed the New Jersey legislature.[129] Governor Phil Murphy likely will not veto the legislation.[130]

III. SURROGACY LAW OVERDUE FOR REVIEW: AN INTENT-BASED STANDARD SHOULD BE USED TO ENFORCE SURROGACY AGREEMENTS

Surrogacy arrangements remain unproblematic most of the time, but if disputes arise surrounding the agreement, the outcome may be different depending on the circumstances surrounding the agreement or based on the state, or even county, where parties seek enforcement.[131] Between the many inconsistent statutes and cases dealing with surrogacy agreements, the state of surrogacy law in the United States remains difficult to decipher.[132] Because many states remain silent as to the validity of surrogacy agreements, most intended parents take a huge gamble when they enter into a surrogacy agreement.[133] This state-to-state inconsistency may cause additional problems where intended parents find gestational carriers in another state.[134]

Therefore, states should enforce surrogacy agreements. Enacting legislation to enforce surrogacy agreements would be the most effective way to do so, but courts should enforce these agreements until adequate legislation can be enacted. In doing so, courts should analyze agreements using an intent-based standard. States should create restrictions on how surrogacy agreements should be enforced to ensure all parties to these agreements can receive adequate protection from the state.

A. Inducing Change: Surrogacy Agreements Should Be Permitted and Enforced

Gestational surrogacy agreements should be enforced by states to ensure all

127. *See id.*

128. *See* Wilkinson, *supra* note 104.

129. *See* David Gialanella, *Gestational Carrier Bill Clears Legislature*, N.J. LAW J. (Apr. 13, 2018), https://www.law.com/njlawjournal/2018/04/13/gestational-carrier-bill-clears-legislature/ [https://perma.cc/QZL2-BN6R].

130. *See id.* (noting that the legislation "could be met with a friendlier reception from new Gov[ernor] Phil Murphy").

131. *See* DiFonzo & Stern, *supra* note 8, at 356 (stating gestational carriers "rarely refuse to relinquish a child after giving birth").

132. *See* Conklin, *supra* note 8, at 72.

133. *See* MOULDING, *supra* note 98, at § 1:33.

134. *See* Debra E. Guston & William S. Singer, *A Well-Planned Family: How LGBT People Don't Have Children by Accident*, 282 N.J. LAWYER 36, 40 (2013) (explaining choice of law issues may arise and giving example from New Jersey).

parties to the agreement receive adequate legal protection. Many anti-surrogacy advocates argue surrogacy, as a practice, should not be allowed and therefore surrogacy agreements should not be enforced. One of the biggest concerns these anti-surrogacy advocates have is the risk of commodification and exploitation of women and children involved.[135] However, surrogacy can also be viewed as a form of reproductive choice, empowering women to make their own decisions regarding their bodies.[136] Furthermore, the risk for exploitation can be eliminated through regulation of the practice.[137]

Surrogacy allows women to provide their reproductive services to other individuals.[138] A main criticism of surrogacy is that it commodifies womens' bodies and the children they give birth to.[139] Commodification is defined as "to treat (something that cannot be owned or that everyone has a right to) like a product that can be bought and sold."[140] These critics compare surrogacy to baby-selling or a specifically commissioned adoption, both of which are "universally prohibited," because they allow individuals to pay someone to have a child for them.[141] Critics also compare surrogacy to prostitution, claiming the women involved sell the use of their bodies.[142] Yet women who act as gestational carriers do not sell their bodies or their children; rather, they are providing reproductive services to others who need them.[143] Critics claim this distinction is minor and difficult to decipher.[144] Unlike baby-selling, a surrogate does not get pregnant with the hopes of finding someone to purchase the child from her; unlike commissioned adoption, intended parents do not randomly approach women and ask them to get pregnant to take her child. These agreements are entered into by knowledgeable and informed parties who agree to begin the pregnancy process. Additionally, a carrier is rarely the genetic mother to the child due to the technological advances IVF has provided. This fact also decreases the connection between baby-selling, as a gestational carrier is not putting a price on her genetic material but only provides her reproductive services to carry another couple's child to term.

Due to these advances in technology, women can now use surrogacy as a way to pass on their genes. Some critics of surrogacy claim the practice promotes

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135. *See* MARGARET JANE RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS, 137, 140–44 (1996); *see also* Larkey, *supra* note 112, at 613–14.

136. *See* Kerian, *supra* note 15, at 158–64 (discussing procreative choice).

137. *See* Sonia M. Suter, *Giving in to Baby Markets: Regulation Without Prohibition*, 16 MICH. J. GENDER & L. 217, 260 (2009) ("With so many participants potentially vulnerable to the forces of baby markets, we have an obligation to ensure their ability to participate with full understanding of the risks involved, as well as to be protected from the power imbalances and coercive influences of the market.").

138. *See id.* at 154–55.

139. *See* RADIN, *supra* note 135, at 144.

140. *See Commodify*, MERRIAM WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/commodify [https://perma.cc/AAL3-6TAB] (last visited Apr. 19, 2017).

141. *See* RADIN, *supra* note 135, at 137.

142. *See* Larkey, *supra* note 112, at 614.

143. *See* Debra Satz, *Feminist Perspectives on Reproduction and the Family*, STAN. ENCYCLOPEDIA OF PHIL. (2013), http://plato.stanford.edu/archives/win2013/ entries/feminism-family/ [https://perma.cc/XJ7Z-SZXC].

144. *See* Larkey, *supra* note 112, at 614.

a gender hierarchy by using women's bodies to perpetuate a male genetic line.[145] Surrogacy had historically been an opportunity for men to pass on their genes through traditional surrogacy, typically when their partners were unable to conceive children.[146] Critics therefore argue surrogacy makes women "fungible in carrying on the male genetic line."[147] However, concerns relating to a gender hierarchy are no longer applicable due to gestational surrogacy. Thanks to IVF and gestational surrogacy, intended mothers have the same access as intended fathers to use surrogacy to pass on their genetic line.

Surrogacy also provides women with reproductive choice. Many commentators believe surrogacy enforces oppressive gender stereotypes, that women are "baby-machines," nurturing caregivers, and service providers.[148] In some ways, surrogacy does give away control of a woman's body by allowing others to suggest to her what she can eat, drink, etc.[149] Even so, surrogacy can actually act as a way to empower women. Surrogacy gives women the option to control their bodies by making the choice of whether to act as a gestational carrier for others.[150] Being able to carry a child for someone who is unable to do so can be empowering, and helping someone to have a child may also be viewed as a rewarding gift. Many women find being a surrogate as a way to give back to others and enjoy doing it.[151] This reasoning explains why some women choose to act as gestational carriers in a purely altruistic agreement. Women should be able to decide for themselves if they want to partake in helping another this way.

Further, risks of exploitation can be limited through regulation of the practice. Exploitation presents a serious concern of commercial surrogacy, one the *Baby M* court expressed in its opinion.[152] When individuals can pay large sums to potential surrogates, many worry surrogacy will become a practice only available to very wealthy individuals.[153] Of particular concern is the notion that even wealthy women with no fertility problems may utilize the practice.[154] Correspondingly, poor women who need the money may be pressured into acting as surrogates for the wealthy.[155] However, many of these concerns can be avoided through careful regulation of surrogacy agreements.[156] Most importantly, limiting agreements to altruistic surrogacy agreements with only reasonable expenses compensated, or limiting fees to very modest compensation, can reduce the risks

145. *See* RADIN, *supra* note 135, at 141.
146. *See id.* at 142.
147. *See id.* at 142.
148. *See id.*
149. *See* Satz, *supra* note 143.
150. *See* Larkey, *supra* note 112, at 616.
151. *See* Amy Levin-Epstein, *Why I Was a Surrogate Mother*, BABBLE (2011), http://www.babble.com/pregnancy/be-a-surrogate-mother-surrogacy-story/ [https://perma.cc/99GB-VE5T].
152. *See In re* Baby M, 537 A.2d 1227, 1242 (N.J. 1988).
153. *See* Satz, *supra* note 143 (stating commentator, Elizabeth Anderson, particularly concerned with exploitation due to potential surrogate mothers having more emotional vulnerability than intended parents).
154. *See id.*
155. *See id.*
156. For a full discussion of ways to restrict surrogacy agreements, see *infra* notes 185–89 and accompanying text.

of exploitation of women.[157] Many statutes allowing the enforcement of surrogacy contracts already include limitations on the expenses that gestational carriers can receive.[158]

Surrogacy agreements continue to be entered into around the country, even in jurisdictions that do not allow or enforce the agreements.[159] Therefore, regardless of personal views towards surrogacy, providing legal protection to parties of these agreements remains important to ensure intended parents, gestational carriers, and the children all have adequate remedies if something goes wrong.

B. Courts Must Adopt an Intent-Based Standard for Determining Parentage in Surrogacy Agreements

An intent-based standard most adequately protects the interests of parties to surrogacy agreements. Not surprisingly, this standard favors the intended parents. The rationale behind the intent-based standard maintains that, but-for the intended parents' decision to procreate and enter the agreement, the child in question would not exist.[160] This standard provides the most protection to all parties in the agreement because it always leaves the child with an individual who planned to raise that child.

The gestational standard set forth in *Baby M* is outdated now that gestational surrogacy represents the preferred method of surrogacy. The *Baby M* decision largely depended on the fact that the agreement was a traditional surrogacy agreement, and Mrs. Whitehead had a genetic connection to the child.[161] Many courts, including California courts, have refused to uphold traditional surrogacy agreements but have allowed gestational carrier agreements,[162] and most of the legislation passed in the past few years only allows gestational carrier agreements.[163] Further, in a gestational carrier agreement, the intended mother may actually be the one who has a genetic connection to the child.

Supporters of the gestational standard are typically opposed to the enforcement of surrogacy agreements as a matter of public policy.[164] Many of these arguments have been demonstrated through the Supreme Court of New Jersey's decisions in *Baby M* and *In re T.J.S.*[165] Proponents of this standard tend to believe

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157. *See* Abby Brandel, Legislating Surrogacy: A Partial Answer to Feminist Criticism, 54 MD. L. REV. 488, 515-17 (1995) (discussing potential for exploiting women and statutory solutions to this risk).

158. *See, e.g.*, CAL. FAM. CODE § 7962 (West 2017).

159. *See* GUGUCHEVA, *supra* note 8 (showing New Jersey representing 8.12% of the country's surrogacy agreements, significantly higher than many other states, when surrogacy agreements are unenforceable in New Jersey).

160. *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (in bank).

161. *See In re* Baby M, 537 A.2d 1227, 1244 (N.J. 1988).

162. *See* Strasser, *supra* note 25, at 98.

163. *See, e.g.*, CAL. FAM. CODE § 7962 (West 2017); S.B. 1599, 215th Leg., 2012–13 Sess. (N.J. 2012).

164. *See, e.g.*, *In re* T.J.S., 54 A.3d 263, 265, 278 (N.J. 2012) (per curium) (Albin, J., dissenting) (discussing *Baby M* and stating "[w]e did not declare void as against public policy surrogacy contracts that protect the rights of the birth mother to assert parentage after the child's birth" (citations omitted)).

165. *See, e.g.*, *id.* at 278–79; *Baby M*, 537 A.2d at 1246–51.

that a woman who gives birth to a child has parental rights that cannot be forfeited under any circumstances.[166] However, a woman should be able to freely contract and to decide for herself whether to forfeit her parental rights. Additionally, the gestational approach may leave children without adequate legal protection at times. If an intended father passes away during the time frame before the intended mother can adopt the child, the child may be left without legal parents. While the surrogate can be recognized as the legal mother, more often than not, she does not want to be recognized as such because she had no intention of raising the child.

A gestational approach raises equal protection concerns in most circumstances.[167] Statutes and cases requiring a woman to gestate and give birth to a child in order to be recognized as the natural mother of the child or the legal mother upon the child's birth discriminate against infertile women.[168] Parentage statutes have long recognized numerous ways to be a father that extend beyond biology or genetics. For example, the relevant New Jersey statute lists ten different ways a man will be presumed the father of a child, including holding himself out as the natural father of the child, seeking to have his name put on the birth certificate, or simply being married to the biological mother.[169] However, the only way New Jersey recognizes a woman as the natural mother of a child is by giving birth to the child.[170]

Allowing an infertile man who is not genetically related to a child to be recognized as the legal father but not allowing an infertile woman who is not genetically related to the child to be recognized as the legal mother is a violation of the constitutional equal protection guarantee.[171] Infertile women are then burdened by the cost and timeliness of the adoption process, while men who are not genetically related to their children can immediately be recognized as the legal father without going through the adoption process.[172] While there are physiological differences in how couples proceed when the man, as opposed to the woman, is infertile, these differences do not affect the basic situation that a woman who is genetically related to her child cannot be recognized as the child's legal mother. A man can be recognized as the father of a child through marriage, even if he has no connection to the child; yet a woman who has initiated and planned a pregnancy cannot be the legal mother.[173]

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166. *See Baby M*, 537 A.2d at 1247.

167. *See, e.g.*, Dara L. Hoffman, *"Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 454 n.16, 467 (2009).

168. *See id.* at 467.

169. *See* N.J. STAT. ANN. § 9:17-43 (West 2017).

170. *See id.* § 9:17-41.

171. *See In re* T.J.S., 54 A.3d 263, 269 (N.J. 2012) (per curium) (Albin, J., dissenting) ("Despite the obvious anatomical and physiological differences between the infertile husband and wife, once a surrogate knowingly and voluntarily surrenders her parental rights, their situations are not meaningfully different. Denying the infertile wife and her intended child, as here, the same benefits and privileges given to her male counterpart and his intended child bears no substantial relationship to a legitimate governmental purpose and abridges her right to the equal protection of the laws.").

172. *See id.*

173. See generally N.J. STAT. ANN. § 9:17-44(a) (West 2013) (presuming husbands of

Additionally, a purely genetics-based approach cannot adequately address the issues with surrogacy agreements either, as evidenced by the limited number of courts who have used this doctrine.[174] An approach based on genetics seems like a reasonable option at first glance because it appears straightforward and easy to implement. However, in today's world of ARTs, this approach severely lacks merit. In *Belsito*, the court addressed the intent-based approach but ultimately decided upon the genetics approach for three reasons: "(1) the difficulty in applying the *Johnson* intent test; (2) public policy; and (3) *Johnson*'s failure to recognize and emphasize the genetic provider's right to consent to procreation and to surrender potential parental rights."[175] The court recognized the gestational carrier may have some rights to the child but failed to address what would happen in those circumstances.[176] Therefore, the court's approach only works when, as in *Belsito*, the parties agree to begin with.

A genetics-based approach does not serve any interests of the state. This approach does not keep the baby with the biological mother, and it does not ensure the child has individuals to take care of him or her. In fact, a purely genetics-based approach could leave a child with no legal parents at all.[177] Alternatively, the genetics test may determine that a gestational carrier who has no intention of raising the child is the legal mother. In *Belsito*, the court recognized two tests for determining parentage, genetics and birth, but found birth should be used secondarily.[178] Therefore, if a donor sperm and egg are used, the two options for parentage under the genetics-based approach are the genetic donors or the gestational carrier who, in cases like *Belsito*, may not even be trying to assert parental rights.

An intent-based approach adequately accounts for the best interests of the child. Commentators assert that general family law principles should apply, and agreements should be enforced using a standard based on what is considered in the best interests of the child.[179] The application of this family law standard seems logical because this is a family law scenario, and the interests of the child are always important. As the court pointed out in *Johnson*, the best interests of the child will typically fall in line with an intent-based standard.[180] Relying on intent ensures the individual(s) who decided to and planned for raising a child

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women who have been artificially inseminated with donor's sperm to be fathers of children conceived through artificial insemination); see also id. § 9:17-41(a) (defining mother and child relationship based only on who gave birth to child); id. § 9:17-43(a)(1) (listing all ways man can be presumed to be child's father).

174. *See supra* notes 97, 107–09 and accompanying text explaining that a California court was in the minority of courts that applied a genetics-based approach, and that the California legislature chose to regulate surrogacy agreements instead.

175. *See* Belsito v. Clark, 644 N.E.2d 760, 764 (Ohio C.P. 1994).

176. *See id.*

177. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998) (expressing shock at trial court's decision to find child had no legal parents and calling trial court's decision "extraordinary").

178. *See Belsito,* 644 N.E.2d at 767.

179. *See* Johnson v. Calvert, 851 P.2d 776, 789 (Cal. 1993) (in bank) (Kennard, J., dissenting).

180. *See id.* at 783 (majority opinion) ("[T]he interests of children, particularly at the outset of their lives, are '[un]likely to run contrary to those of adults who choose to bring them into being.'" (citation omitted)).

will be the ones doing so.[181] This assurance applies even if the intended parent is the one who attempts to revoke the agreement.[182]

Parties to a surrogacy agreement should not be permitted to rescind the agreement or change their intent. This rule should apply to both intended parents and to gestational carriers. Surrogacy presents a unique situation where the surrogate has nine months to carry and bond with the child she is carrying. Some critics of an intent-based approach argue a surrogate can never really know how attached she may become to the baby.[183] A solution proposed by some critics would allow parties to enter into these agreements as long as the surrogate has a short time frame after giving birth where she can change her mind.[184] Such a time period would not be in the best interests of the child. The legal parents of the child should be known upon birth, so the child is always adequately taken care of physically and legally. Problems can arise if the legal parents are unknown for even a short period. For example, consider a child who is born with medical issues that need to be addressed. In that time period where a carrier can choose to rescind an agreement, who would be responsible for making treatment decisions for the child? On the other hand, consider a scenario like the Sherri Shepherd case. If a child's intended parents are not held accountable and rescind the agreement, but the carrier never intended to take care of the child, who is responsible for the child then? These circumstances highlight why the child's legal parents need to be identified prior to the birth of the child. An intent-based standard should therefore be used to interpret surrogacy agreements so the children born through surrogacy agreements always have individuals who are prepared to take care of them legally and financially.

C. It's Time to Push for Restrictions on Surrogacy Agreements

Restrictions should be in place in every state validating gestational surrogacy agreements because proper restrictions would allow the state to regulate the arrangements and provide protection to all parties. Enacting state legislation would be the most effective avenue to achieve these restrictions.[185] Until every state can implement these statutes, courts should also consider these limitations as they interpret and enforce surrogacy agreements.

Perhaps the most important constraint would be limiting enforcement of surrogacy agreements to gestational carrier agreements.[186] Gestational surrogacy

181. *See id.* ("Moreover, as Professor Shultz recognizes, the interests of children, particularly at the outset of their lives, are '[un]likely to run contrary to those of adults who choose to bring them into being . . . . Thus, '[h]onoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike.'" (citation omitted)).

182. *See, e.g.*, *In re* Baby S, 128 A.3d 296, 300–01 (Pa. Super. Ct. 2014).

183. *See* RADIN, *supra* note 135, at 146.

184. *See id.*

185. *See generally* Melissa Ruth, Note, *What to Expect When Someone Is Expecting for You: New Jersey Needs to Protect Parties to Gestational Surrogacy Agreements Following* In re T.J.S., 60 VILL. L. REV. 383 (2015) (providing more detailed explanation of this author's thoughts on ideal surrogacy legislation).

186. *See* Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy*

has become more prevalent than traditional surrogacy.[187] In addition, eliminating the possibility of a surrogate being genetically related to the child removes another avenue for states to find against the surrogacy agreement.

Adequate regulations would also include restrictions on who can become a surrogate, requiring an age minimum, prior successful pregnancies, and medical and psychological evaluations prior to entering the agreement.[188] Similarly, intended parents should be required to undergo psychological evaluations to ensure they are fit parents.[189] These restrictions increase the chances of a successful surrogacy arrangement with compliance by all parties. Medical requirements and requiring past successful pregnancies would also increase the likelihood of having a successful pregnancy.

Statutes can also regulate the compensation gestational carriers can receive. Limiting expenses would alleviate many concerns regarding commercial surrogacy and baby-selling due to the exclusion of exorbitant fees. Limiting costs also reduces the risk of women being exploited or coerced into acting as gestational carriers. Expenses should be limited to those related to the pregnancy, which will encourage altruistic surrogacy arrangements. States can limit compensation to the expenses they find acceptable and in line with public policy.

These regulations would protect all involved by giving them judicial enforcement of the agreement consensually entered into before the process began. Regulatory guidelines would also ensure the existence of thorough and well-thought-out agreements. It is also highly recommended that the intended parents and the gestational carrier be required to retain independent counsel to review the agreement. Most importantly, regulations would ensure the child always has legal parents at birth who are prepared to raise the child and provide for the child financially.

IV. CONCLUSION

The confusing state of surrogacy law affects many individuals: infertile couples, women facing high-risk pregnancies, and same-sex couples, to name a few. Actual disputes over these agreements are infrequent, and surrogacy can be a great way for individuals to have children with whom they share a genetic connection when they cannot conceive naturally. Individuals seem to be willing to enter into these agreements, even where there is risk, and even when they have to fly across the country to sign an agreement or to meet their gestational carrier. Allowing, but regulating, surrogacy would protect all parties to these agreements, which will occur whether or not the state intervenes. A consistent judicial and legislative approach to surrogacy is necessary to make surrogacy more accessible to all individuals who want to start or expand their families and who may benefit from the practice.

Contracts, 31 MCGEORGE L. REV. 673, 690 (2000).

187. *See id.* ("Fortunately, the advent of in vitro fertilization has rendered traditional surrogacy obsolete and unnecessary.").

188. *See* S.B. 1599, 215th Leg., 2012–13 Sess. (N.J. 2012) (requiring many of these suggestions).

189. *See id.*